

Computer Co. v. State Div. of Health and Social Services Del.Ch., 1989. Only the Westlaw citation is currently available.  
 UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.  
 The COMPUTER COMPANY et al.

v.

[STATE] DIVISION OF HEALTH AND SOCIAL SERVICES.

**CIVIL ACTION No. 11072.**

Submitted: Sept. 12, 1989.

Decided: Sept. 19, 1989.

On Plaintiffs' Motion for A Preliminary Injunction Enjoining Award of Contract: denied.

Lawrence S. Drexler, Elzufon, Austin & Drexler, P.A., Wilmington.  
 Malcolm S. Cobin, Department of Justice, Wilmington.  
 Glenn C. Kenton, Richards, Layton & Finger, Wilmington.  
 HARTNETT, Vice-Chancellor.

\*1 Plaintiffs are The Computer Company, the unsuccessful bidder for the award of a contract to furnish computer services to defendant, The Division of Health and Social Services, and Stephen Creekpaum, an employee of The Computer Company and an alleged citizen and taxpayer of the State of Delaware.

Plaintiffs seek a preliminary injunction enjoining defendant from entering into a contract with Intervenor, E.D.S. Federal Corporation, the only other bidder. Plaintiffs also claim a violation of the Delaware Freedom of Information Act. Because plaintiffs have not shown the reasonable probability that they will ultimately prevail on the merits of the claims which are presently ripe for consideration by the Court, their application must be denied.

I

The dispute arises because the defendant, on May 22, 1989, requested sealed bids for services as a Medicaid Fiscal Agent. The Fiscal Agent is to

design and furnish computer services to defendant. Similar services had been furnished by The Computer Company to defendant for over ten years pursuant to contracts entered into in 1978 and 1983. The services to be furnished require considerable specialized knowledge and expertise.

The Request for Bids stated in various places that "Chapter 69 Delaware Code [sic] applied to the bidding". Chapter 69, Title 29, Delaware Code is the general bidding statute of the State. The Request for Bids, however, also set forth that an evaluation criteria would be used based on a 70% technical/30% cost ratio.

The use of the evaluation criteria concept was known to The Computer Company as early as December 1988 and a pre-bid conference was held on June 19, 1989 which was attended by Company representatives.

The deadline for submission of bids was eventually extended to July 5, 1989. The plaintiffs allege that the bids were not opened publicly and it is conceded that after the bid deadline the defendant engaged in two telephone conversations with E.D.S. Federal Corporation about its proposal.

On July 13, 1989, the defendant issued a revised procurement statement and requested oral presentations by both bidders. On July 25, 1989, defendant sent a letter to the two bidders calling for their "best and final offers."

On August 1, 1989, E.D.S. Federal Corporation hand delivered its best and final offer and, on August 17, 1989, defendant advised E.D.S. Federal Corporation that it would negotiate exclusively with it.

The Secretary of the Division of Health and Social Services, in the meantime, had appointed a Selection Committee and a Technical Review Committee to consider the proposals. Both of these committees decided that E.D.S. Federal Corporation should be awarded the contract although its estimated price was over \$3 million in excess of the price quoted by The Computer Company.

Defendant concedes that the bidding procedure followed does not comply with the mandates of Chapter 69, Title 29, Delaware Code but asserts that

the statute does not apply to the contract in question.

## II

\*2 First, I find that Subchapter I, Chapter 69, Title 29, Delaware Code, does not apply to the proposed contract.

29 Del.C. § 6903(a) in pertinent parts states:

“(a) All material required by any agency shall be purchased, except where hereinafter provided, *and all work of a nonprofessional nature*, except as hereinafter provided, which is not to be performed by employees of the agency shall be performed under a contract entered into pursuant to this subchapter and after competitive bidding as provided for in this section, except that an agency may purchase material or contract for work to be performed without competitive bidding in the following instances:

(6) If the material to be purchased is computer hardware and/or software, the primary purpose of which is to process information in the form of data, words, images, graphics or voice, the following conditions shall apply:

(c) *In lieu of competitive bidding*, the Budget Director shall establish *policies and procedures* under which procurement of such materials may take place. Such policies and procedures may not be promulgated without the signed approval of the Secretary of Finance and the Controller General. (Emphasis added.)

Subchapter I, therefore, by its expressed terms, excludes all work of a professional nature. “Profession” has been defined as: “A vocation or occupation requiring special, usually advanced, education and skill.” BLACK’S *Law Dictionary*, 5th Ed. It is clear that the services to be provided under the contract in question require special and advanced education and skills.

In *Autotote, Ltd. v. N.J. Sports & Expo Auth.*, N.J.Sup., 427 A.2d 55 (1971), the New Jersey Supreme Court held that a similar New Jersey bid statute did not apply to professional services.

In addition 29 Del.C. § 6903(a)(6) and (c) specifically exclude from the provisions of Chapter 69 the purchase of “computer hardware and/or software” provided that the Budget Director establishes policies and procedures for their purchase. It is not disputed that such policies and procedures have been established.

I, therefore, find that the provisions of Subchapter I, Chapter 69, Title 29, Delaware Code, by their clear and unambiguous express terms, do not apply to the contract in question.

## III

Plaintiffs, however, claim that the provisions of Subchapter II, Chapter 69, title 29, Delaware Code require that the provisions of Subchapter I, Chapter 69, Title 29 apply to this contract.

They first claim that the two subchapters are *in para materia*. I find that they are not because Subchapter II was adopted in 1974—decades after Subchapter I was adopted.

Subchapter II also, by its express terms, as will be discussed, applies only to five professions, four of which are concerned with improvements to real estate.

## IV

Plaintiffs assert that the definition of “Professional Services” contained in § 6930(a) of Subchapter II, Chapter 69, Title 29 requires that Subchapter II apply to this contract. 29 Del.C. § 6930(a) states:

\*3 “Professional services” shall mean those services within the scope of practice of architecture, professional engineering, professional land surveying, landscape architecture and geology as defined and authorized by the laws of the State of those services performed by persons engaged in the above-mentioned professions in connection with their professional employment or practice.”

This clear and unambiguous language, however, limits Professional Services (for the purpose of Subchapter II) to architecture, engineering, land surveying, landscape architecture and geology as those professions are defined and authorized by the law of the State. Cf. *Spielberg v. State*, Del.Supr.,

558 A.2d 291 (1989).

Subchapter II, Chapter 69, Title 29 therefore cannot apply to Professional Computer Services.

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Not Reported in A.2d, 1989 WL 108427 (Del.Ch.)

V

END OF DOCUMENT

Plaintiffs in their suit also allege violations of the Delaware Freedom of Information Act, 29 *Del.C.* Ch. 100. It seems clear to me that the documents in the possession of defendant, or any committee of defendant, are public records subject to the provisions of the Freedom of Information Act.

At oral argument on September 12, 1989, however, I granted plaintiffs' Motion For Expedited Discovery which includes a request for production of these records. The plaintiffs' claims based on the Freedom of Information Act are therefore now moot and need not be considered in this Motion For A Preliminary Injunction. See *Stroud v. Milliken*, Del.Supr., 547 A.2d 633 (1989).

VI

At oral argument the attorney for E.D.S. Federal Corporation suggested to the Court that this suit should be dismissed because, even if this Court directed defendant to rebid the contract, defendant would not award it to The Computer Company.

If E.D.S. Federal Corporation has obtained such an improper commitment from the defendant, it may show collusion, which plaintiffs can pursue in their discovery. If E.D.S. Federal Corporation has not discussed this with the State, I fail to see how I can do other than presume, at this juncture, that the defendant will in good faith perform its duties in accordance with the law. I therefore have not given any weight to that argument.

I also have not considered the Motion To Dismiss Arguments, nor plaintiffs' assertion that defendant acted arbitrarily or capriciously because these issues are not ripe for consideration. See *Stroud v. Milliken*, *supra*. The laches and unclean hands arguments are rendered moot by my holding that the provisions of Chapter 69, Title 29, Delaware Code do not apply to the contract in question.

For the reasons stated, I deny plaintiffs' Motion For a Preliminary Injunction. IT IS SO ORDERED.